SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER, 1974 TERM

No. 73-1725

IRVING BERLIN MUSIC CORPORATION,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM ON BEHALF OF PETITIONER

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I

In a footnote at the bottom of page 5 of the Government memorandum, it is asserted that the issue is purely one of law and that summary judgment was appropriately granted. It is stated there that the only question presented is—

> . . . whether the statute should be construed to encompass royalties received under the stipulated contract provisions.

But the statement of the question assumes the conclusion the Government seeks to prove, namely, that the payments petitioner received were royalties.

The essential factual basis for the holding below that the payments petitioner received were royalties was that petitioner received them pursuant to a classical royalty arrangement and thus it made no difference that petitioner was an agent and did not own or have any proprietary interest in Mr. Berlin's copyrights.

But as a matter of *fact,* petitioner did not have the same contractual royalty arrangement as that set forth in the Songwriters Protective Association standard form of contract, pursuant to which the composer assigns and transfers his copyrights in his songs to the music publisher. Here, petitioner owned none of Mr. Berlin's copyrights; petitioner thus did not have the same arrangement as music publishers who have received assignments of the copyrights pursuant to the SPA contract and earn the royalties thereon when the copyrights are licensed.

Thus, the Government has buried in a footnote and failed to meet petitioner's contention that essential findings of fact and inferences adverse to petitioner were made by the Court of Claims. The admonition of the Court of Appeals in *Clausen and Sons, Inc. v. Theo. Hamm Brewing Co.,* 395 F.2d 388, 389 (8th Cir. 1968) becomes pertinent:

> We need not repeat in detail our concern of summary dismissal under Rule 56. If there exists the slightest doubt as to a factual dispute or "genuine issue of fact," summary judgment should be denied. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Williams v. Chick,* 373 F.2d 330 (8 Cir. 1967); *Larsen v. General Motors Corp.,* 391 F.2d 495, 8 Cir., March 11, 1968.

The efficacy of the agency should not have been decided summarily. The opinion of this Court in *White Motor Co. v. United States,* 372 U.S. 253, 263 (1962) demonstrates the normal judicial reluctance to dispose of significant legal questions on a *per se* basis without the benefit of a trial and a full record:

> We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as *per se* violations of the Sherman Act.

To the same effect is *Carlson Companies Inc. v. The Sperry & Hutchinson Co.*, 374 F.Supp. 1080, 1096 (D. Minn. 1974), where the court denied a motion for partial summary judgment and noted that it was impossible to hold the business relationship in issue *per se* unreasonable since the courts had not had such "considerable experience" with goods-loan tying arrangements, especially in the stamp business, to warrant their classification as *per se* violative of the Sherman Act. *See also United States v. General Electric Co.*, 303 F.Supp. 1121 (S.D.N.Y. 1969) (on a stipulated record involving use by the defendant of agents in the distribution of lamps, motions for summary judgment denied).

II

The Government contends that the language of the statute mandates an examination of the underlying nature of the payments petitioner received. Not only has the Government inaccurately restated petitioner's point (*Compare* Government Mem. p. 4 *with* Pet. p. 13); but in fact petitioner is of the view that the Court below failed to do precisely what the Government now contends should be done, namely, examine the *character* of the payments petitioner received.

Actually, the Court of Claims adopted the Government's superficial approach in applying the statutory language "compensation, however designated" to those payments. Apart from the fundamental factual error cited before, there are several reasons why that *per se* approach is wrong here.

First, the 1960 amendment of Section 543 of the Internal Revenue Code of 1954 was not for the purpose of broadening the law to tax where no tax was previously imposed. The purpose of the amendment was to grant tax relief to music publishers because of drastically changed conditions in the industry. Thus, the issue is not that Congress never intended to leave a loophole (Pet. App. 18a), but rather is what

Congress intended to cover by the amendment, *i.e.*, music publishers owning copyrights who received royalties and needed an exemption. Petitioner simply did not earn and receive copyright royalties and did therefore neither receive personal holding company income, nor has it sought the benefit of any exemption.

Second, the statutory language was not intended to change and did not change the historical concept of the nature of a copyright royalty, namely, a payment—in the words of the statute "for the use of, or right to use, copyrights in works protected by copyright issued under Title 17 . . .". It is obvious that the only person who can receive a copyright royalty will be the person who *owns* the interest in the copyright which is licensed and who is paid for its use by the licensee. The intermediary agent (such as the petitioner in this case) acting between the copyright owner and the user licensee cannot receive a royalty because the agent owns no property in respect of which any royalty is earned and paid. The character of the payment the agent receives does not arise from use of the copyright owner's property any more than does that of the rental agent who receives compensation for acting as an intermediary in leasing a landlord's real property to the tenant. Although the agent may collect the "rent" from the tenant, retain a portion for the rental and collection services performed and remit the balance to the landlord, it is obvious that the agent does not receive "rental income," but compensation for acting as agent. (*See* Pet. p. 18, fn. 2). Only the landlord who owns the property receives rents; and the same situation pertains here where petitioner under the stipulated contractual provisions collected royalties on behalf of Mr. Berlin.

Third, a review of the statutory history will disclose that the clause of the statute, "payments from any person for performing rights" which is quoted in the Government's memorandum (p. 4) covers payments from ASCAP and other performing rights societies for small performing

rights which both sides agree are not even involved in this case. (The case involves grand performing rights.)

Thus, the footnote on page 4 of the Government memorandum is also in error in asserting that pre-1960 cases, which go back to the fundamental common law with respect to the nature of royalty payments and indeed to the prior Roman and civil law of unufruct, are inapposite.

Moreover, the Congressional scheme followed in the Internal Revenue Code indicates that other pertinent remedies are available to the Government if there has been an abuse and that a strained construction of the personal holding company provisions of the Code need not be resorted to in order to avoid an alleged loophole. Thus, the accumulated earnings tax which the Government has asserted in the alternative against petitioner, will be applicable if there has been an unlawful accumulation.

Similarly, if the compensation petitioner received was improperly allocated, (that is, petitioner is found to have received excessive compensation for the services performed), a re-allocation of the proper amount of compensation may be ordered under Section 482 of the Code. The Court of Claims inferentially so recognized:

> We need not comment on what result would be reached had plaintiff been compensated under a different formula.

(Pet. App. 19a) Finally, where the agency is in fact a sham, the Government can attack the copyright owner directly and seek to impute the royalties to him rather than to attempt to charge them to the agent.

We submit therefore that the opinion and summary judgment below are in direct conflict with a previously unbroken line of authorities and ancient precedents to the contrary and should not be permitted to stand unreviewed. Surely Congress in passing a relief act with an admittedly

limited objective, did not intend to reverse an entire prior body of law without a word or even a passing reference thereto in an unusually detailed legislative history which arose over several years in the course of the enactment of this statute.

If the Government seeks to prevent individual composers from operating their own publishing and management companies on an equal footing with the large companies in the field, or to compel a composer to release the management of such copyrights to independent literary and licensing agents, it has succeeded in doing so through this case. We are of the view that Congress did not have any such purpose in mind and that a plenary trial should be had on the merits.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be granted.

September 17, 1974

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